No. 4388

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL EMERZIAN, Defendant in Error.

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff in Error,

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

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By.....Deputy.

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FOR THE NINTH CIRCUIT

KARL EMERZIAN,
Plaintiff in Error,

vs.

S. J. KORNBLUM and
WILLIAM KORNBLUM,
a corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Karl Emerzian, plaintiff in error, is a grower of grapes in the Fresno district. Defendant in error, S. J. and William Kornblum, is a New York corporation engaged in the shipment and sale of fresh grapes from California to the Eastern markets, and acted throughout the transactions involved in the suit, through Samuel J. Kornblum, its duly authorized agent.

In June, 1922, the parties entered into a contract by which Emerzian agreed to sell, and the corporation agreed to buy, 100 cars

of Muscat grapes. The contract is brief, reading:

> "For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:
>
> "Witnesseth:—
>
> "That Karl Emerzian, party of the first *party of the first* part agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One hundred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.
>
> "Same Fruit must be free of rain damage and suitable for Eastern shipment.
>
> "Shipment to begin when Fruit is well matured.
>
> "If buyer insists on covered lugs, he must pay the expense of same.
>
> "Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.
>
> "On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.
>
> "In the event of Strikes or car shortage beyond the Sellers control, Seller is not responsible for delivery.
>
> S. J. & Wm. Kornblum
> By S. J. Kornblum."

Pursuant to the terms of the contract and after its execution, Emerzian asked and

received from the corporation, the sum of $10,000.00 as an advance. Shipment was begun under the contract on September 2nd and continued with fair regularity until the 26th of October, at which time a total of 48 cars had been received and paid for by the corporation, $100.00 being deducted, however, and charged against the original advance of $10,000.00. Forty-eight hundred dollars of this original advance had thus been accounted for, leaving in the hands of Emerzian, $5200.00.

A shortage of refrigerator cars developed in the Fresno district during that shipping season, becoming acute in October.

On the 18th of October an additional writing was made between the parties. The testimony as to the making of this additional contract is in violent dispute between the parties, Kornblum testifying that he was compelled to accept it by Emerzian, and the latter testifying that it was made at Kornblum's request. The corporation pleads (Transcript p. 19) that it "demanded and procured a writing from defendant that he would further deliver to plaintiff at least fifteen cars."

Two documents were written, one signed by Kornblum and another by both, and their

language is slightly different. Since they are short, they may be inserted herein.

> "I hereby agree to accept On the 100 cars Moscats to be loaded in refrigerator as per contrackt up to the present time he K. Emerzuan allready delivered 45 cars K. Emerzian to deliver no less than 15 cars more that will make 60 instead 100 cars if Minkler ranch however has more he agrees to deliver all
>
> S. J. Kornblum
> of Brooklyn N Y"

> "I hereby agree to acceppt On the 100 cars Muscat to be loaded in refrigerators as per contrackt up to present time he K. Emerzian allready delivered 45 car K. Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch Camp Six he must give me or deliver
>
> S. J. Kornblum
> K. Emerzian

The documents are both in the handwriting of Kornblum and it is without contradiction in the evidence that Emerzian wanted the provision "subject to car shortage" inserted. This Kornblum refused. The instruments are practically identical; one uses the expression "no less than 15 cars more" and the other "15 cars more anyhow."

Deliveries after the 18th of October were made practically as before, on the 19th, 22nd

and 26th, and were accepted and paid for.

The market price of Muscat grapes in the Fresno district had advanced from something below $50.00 a ton on September 1st, to about $85.00 a ton on October 23d, on which day the market broke. After that date, grapes were not salable.

Mr. Foley, a shipper of wide experience, called for defendant in error, said: "I was not able to get any buyers for any kind of grapes in Fresno after the 23d of October." (Transcript pp. 77.) And further, "On the 23d, you might have found a buyer on the 23d and 24th, but the Eastern markets broke badly on the 23d, and all indications were for a heavy decline, and nobody was looking to buy grapes among shippers. They were trying to unload what they had." (Transcript pp. 78.)

F. M. Withers, a witness called by defendant in error, said: "The market went off as a matter of common history on the 23d * * * it happened in twenty-four hours. The cause might have been the immense number of cars shipped from this neighborhood." (Transcript pp. 71.)

On October 27th, one-half inch of rain fell in the Fresno district. After this rain, the

corporation refused to take any grapes tendered by Emerzian, claiming that they were rain damaged and unfit for shipment to the Eastern market.

On November 3d, 1922, the corporation filed its action in the United States District Court for the Southern District of California, praying damages against Emerzian in the sum of $26,000.00 and return of the $5200.00 deposit. The complaint was amended in a respect not material to this hearing, and Emerzian, in due time, filed his answer to the amended complaint, denying his breach of the contract, and denying damage suffered by the corporation, and by way of counterclaim, seeking damages against the corporation for failure to receive and accept the 52 cars of grapes left upon his hands. He further alleged, by way of cross-complaint, that he had entered into a verbal contract to sell, and the corporation to buy, other grapes, and that by agreement, $3,000.00 of the advance was applied on the purchase price of these additional grapes, and alleging failure on the part of the corporation to receive and accept additional grapes, and praying damages against the corporation for its breach of this contract.

The action was tried before the Court,

Honorable W. P. James presiding, and judgment rendered in favor of the corporation, being defendant in error, adjudging it entitled to damages in the sum of $13,260.00, and for the return of the unpaid part of the advance, being $5200.00.

The Court passes upon the questions presented in its opinion found on Transcript pp. 109-116.

In his opinion (Transcript pp. 109 to 116) Judge James is in error as to the date of the delivery of the last car. This was on October 26th instead of October 22nd as stated on page 110 of the Opinion. (Exhibit H, Tr. p. 96.) He arrives at the market value by taking an average of six different periods, ignoring the period from October 23d to 27th when there was no market. In effect, he finds that the shipping season closed on October 27th when the rain came. He further finds that there was no consideration for the new agreement of October 18th, but that if this agreement were to be given effect, it would not change the original agreement because the agreement of October 18th included all grapes on the Minkler place, and according to the testimony, the product of this place was sufficient to make up the undelivered portion of the contract. The effect of the opinion is to fix the time of the breach of

the contract as of October 27th, the Court saying, (Transcript pp. 112) "All of the tenders of cars of grapes shown to have been made by the defendant occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offers of deliveries after that date."

ERRORS RELIED ON

For reversal, the plaintiff in error relies upon the following points:

1. Evidence was admitted and acted upon by the Court in its judgment showing the price of grapes described in the contract throughout the season, when under the law, evidence should have been admitted of the price only at the time of the breach of the contract. These errors are specified in the specification of errors, as numbered 1, 5, 16 and 17, and relate to, and comprise the objections made to the questions asked of witnesses Karl Emerzian, S. J. Kornblum, F. M. Withers and E. Y. Foley. It is necessary only to refer to specification No. 5 where the Court announced his ruling as follows: (Tr. p. 125)

"THE COURT: 'I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

"I will admit the testimony showing the whole range of prices during the whole period, and leave it open to you gentlemen to argue further if you care to."

2. The Court committed error in admitting testimony of the various proposals and counter proposals made at the time of the execution of the modifying agreement on October 18th, 1922. The witness, S. J. Kornblum, was allowed to testify at length as to the conversations that could have had no other effect than to vary the terms of the written instrument set forth in specification No. 2, and to prejudice Emerzian before the Court.

3. The Court committed error in overruling the objection of defendant to the testimony of the witness S. J. Kornblum, that he went into the market and bought grapes to supply his demands, after the alleged failure of defendant Emerzian to deliver. This is shown in specifications 6, 7 and 9.

4. Error was committed in allowing the witness, S. J. Kornblum, to testify over the objection of defendant, that on the strength of the contract with Emerzian, he entered into a contract with people in the East to

deliver them Muscat grapes. This is covered in specification No. 8. The rule of damages is laid down by the Civil Code, and this evidence was entirely outside the issues and not a proper element of damages.

5. The Court committed error in sustaining the plaintiff's objection to the question asked witness S. J. Kornblum, on cross-examination, as to whom other than Charles Emerzian, he told that the contract of November 18th had been extorted from him, set forth in specification 13.

6. A further error was committed by the Court in refusing to allow defendant to amend his pleading or to offer to amend the same by pleading the shortage of cars as a separate defense, the same being made necessary by the position taken by the plaintiff in objecting to the introduction of the modifying agreement of October 18th.

7. Further error was committed by the Court in its computation of damages in that the period when no price was obtainable for grapes is not included in his average of price.

8. A sufficient car supply was a condition precedent to liability on the part of defendant.

ARGUMENT

An examination of the record in this case will show the following propositions established without dispute:

1. No time is limited in the contract in which delivery of the grapes was to be completed.

2. According to the pleading of defendant in error, it "then and there demanded and procured a writing," being the agreement of October 18th, from plaintiff in error. It is in Kornblum's own handwriting. Emerzian asked that the provision, "subject to car shortage" be put in, which Kornblum refused.

3. The market for Muscat grapes broke on October 23d, and after that date, they could not be given away.

4. Deliveries were continued and accepted by Kornblum to and including October 26th.

5. There was no rain before October 27th.

Referring now to our first specification of error, the rights of the parties to the action manifestly are governed by the California Civil Code, Section 3308.

"The detriment caused by the breach of seller's agreement to deliver personal property * * * is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to seller under the contract, if it had been fulfilled."

C. C. 3308.

"The value of property to a buyer" is defined in another section.

> "In estimating damages * * * the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in a market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty, upon which his right to damages is founded, as would suffice with reasonable diligence for him to make such a purchase."
>
> C. C. 3354.

It will not be disputed, of course, that under the Civil Code of California above cited, plaintiff is confined in his claim for damages to the difference between the contract price and the market price at the time when the contract was breached. This must be at the latest time when defendant might have fulfilled his contract.

The learned Judge of the District Court recognizes this for he says in his opinion, (Transcript pp. 112) "All of the tenders of cars of grapes shown to have been made by defendant occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offered deliveries of grapes after that date."

When did the "breach of duty" upon which, perforce, the right to damages in this case depends, occur? Can it be argued that it occurred at a time when the buyer, Kornblum Corporation, was receiving and accepting cars under the contract? It must be borne in mind that when negotiations that resulted in the modified contract were pending, according to his own testimony, Kornblum told Emerzian, " 'Well,' I says, 'what is the use of arguing about it now? Why don't you go on and give me all you can. Give me a *couple of cars a week and you will be giving me the grapes* and we won't have any fight about it.' " (Transcript pp. 45.) Emerzian did deliver two cars a week after that time.

It will not be denied that if Karl Emerzian on October 23d, 1922, had delivered to the Kornblum Corporation 52 cars of grapes, he would have complied with the terms of his contract. Neither can it be denied that had

he delivered the same on the 24th, 25th, 26th or 27th, he would have been entirely within his rights. He was under no sort of compulsion and no agreement to deliver all the grapes on the 23d or the 24th or the 25th. He was delivering two cars a week, let the Court bear in mind, as requested by Kornblum.

If his rights were still preserved, and if he were within his rights in delivering on the 26th, how, then could it be argued there was any breach in his contract before that date? It is entirely too plain to need any argument that the breach if any occurred when Emerzian first offered grapes that Kornblum refused.

The learned Judge of the District Court, in estimating the damages to be allowed in this case cites 24 Ruling Case Law, Page 72: "Where the goods are to be delivered in installments and there is a failure to deliver two or more, or all of the installments, the proper measure of damages is the sum of the differences between the contract and the market prices of the quantity of each installment not delivered at the respective times of delivery."

R. C. L. pp. 72.

We have no quarrel whatever with the statement of the rule. It does not apply, how-

ever, to the contract before the Court for the reason that that contract did not provide that delivery was to be made in installments. It merely specifies a time when delivery is to commence, but is silent beyond that. Had the parties in mind any condition of this kind, it would have been a very easy thing for them to have inserted it in their contract, such as, "So many cars per week," or "so many cars per month." The fact that they specified the time of commencement of delivery and did not specify the rate of delivery is itself significant that the clause was purposely omitted, but whether omitted purposely or not, it certainly is not the province of the Court to supply it. This contract would have been complied with by Emerzian by delivering the grapes at any time during the shipping season, and he was not in default until this period came to an end.

The only light we have on what constitutes the shipping season is furnished by two witnesses, one E. Y. Foley, one of the largest shippers in the State, called by defendant in error, who says: (Transcript pp. 78) "The last season (1923) we didn't quit shipping until the 23d of December, which was due entirely to the demand and the purpose they wanted the grapes for."

Another witness, Hensley, called by plaintiff in error, said, speaking of the season 1922: (Transcript pp. 105) "We shipped fruit during November up to and until the 30th of November, when we shipped our last car."

Emerzian could have complied with his contract by shipping at any time in November, or even in December.

Referring to the rule laid down in Ruling Case Law and cited by the trial Court, an examination of the citations supporting the language of the text shows clearly the correctness of our contention. Every one of the five cases cited involved contracts calling for definite quantities at definite times, and even then the cases uniformly hold that there is no breach until the expiration of the time provided for delivery of each installment.

The rule cited cannot govern the case at bar for the obvious reason that the contract here involved, does not provide for delivery by installments.

A case quite similar to the case at bar is that of Curtiss vs. Howell, decided by the Supreme Court of New York. Defendant agreed to deliver 1000 tons of tan bark per

year to plaintiff to commence September 1, 1854. By June, 1855, the defendant had delivered only 30 or 40 tons thereof. Plaintiff had repeatedly urged delivery. In June, 1855, plaintiff brought suit, alleging a breach of agreement by defendant. The Court held that defendant had the entire year within which to deliver the 1000 tons. The situation was no different than if defendant had agreed to pay $1000.00 per year, then certainly defendant would have had the whole year within which to pay. In its opinion the Court said, "The Judge upon the trial held, that by the true construction of the contract, the defendant had the entire year to deliver the thousand tons of bark required to be delivered per year during five years. In this, I think he was correct."

Curtiss vs. Howell, 39 N. Y. 211.

Another case practically on all fours with the case at bar, and illustrating precisely the points for which we contend, is Harman vs. Washington Fuel Company, decided by the Supreme Court of Illinois. The action involved a contract where the defendant had agreed to furnish five to eight thousand tons of coal from the date of the contract to April 1, 1903, at $1.40 f. o. b. cars at the mine. The Court says,

> "The defendant had all of the time up to April 1, 1903, in which to furnish plaintiffs with the coal under the contract * * * the parties evidently contemplated delivery from time to time, since the contract provided settlements should be made on or before the first of each month for the previous month's shipment, and shipments were actually begun in August, 1902, and continued until the market price of coal rose above the contract price, and yet the agreement would have been comlpied with by delivery of coal at any time up to April 1, 1903. (Phelps v. McGee, 18 Ill. 155.) There was no evidence of the market price of coal at the mine on that date, and only nominal damages could be given for the breach of that contract."
>
> Harman v. Washington Fuel Co. 81 NE 1017 (1018).

Certainly the provision in the contract in that case that settlement should be made for each month's shipment is more conclusive of installments than anything in the case at bar.

Defendant in error must therefore be confined in his allowance of damages to the market price at the close of the season which certainly did not occur before October 27th. He shipped a car on the 26th.

THE COMPUTATION OF DAMAGES IS INCORRECT

It will be noted that Judge James, in computing the damages, tabulates the market price of grapes at six different periods, beginning with $38.70 per ton, and ending with $86.25; in order to reach his estimate of $67.00 per ton, he divides the total of the six sums added, by six. (Transcript pp. 110) He entirely overlooks the period from the 23d to 27th, when there was no market at all for grapes, and which should have been included, making seven periods, with the result the average price, instead of being $67.00 per ton would have been $57.50. The four days from the 23d to the 27th certainly formed a distinct period contemplated in the contract, and should have been taken into account, even on the theory adopted by the trial court.

MODIFYING AGREEMENT

A great deal of space is taken up in the record with the modifying agreement made by the parties on October 18th, and hereinbefore in this brief set out. Judge James holds that the agreement was without consideration (Transcript 114) but that in any

event, it did not change the obligation of the plaintiff in error under the original contract.

With this conclusion we respectfully differ. Notwithstanding the mass of contradiction attending the execution of this contract, the fact remains that it was executed and delivered, and in the handwriting of Kornblum himself.

The parties agreed to the things therein contained. Emerzian agreed to deliver 15 cars "anyhow"; in the other supposed duplicate, they use the language "no less than 15 cars more, that will make 60 cars instead of 100."

Now, it must be remembered that the evidence in the record is uncontradicted, that Emerzian asked that the clause, "subject to car shortage", be inserted in this modifying contract. This Kornblum refused. Emerzian, therefore, waived a substantial and valuable right that he possessed under the first contract, that is, to escape liability in the event of car shortage. The language of the modifying contract, coupled with the evidence attending its execution, leaves no possible doubt upon this point. The modifying contract is therefore supported by a sufficient consideration.

Whether or not it relieves Emerzian of any burden assumed in the original as suggested by Judge James, we need not discuss. One thing, however, cannot be denied. The effect of the modifying contract was to leave the parties as though they had, on October 18, 1922, for the first time, entered into a contract. In other words, assuming the worst for Emerzian, he agreed, on October 18th, to deliver all of the grapes on the Minkler ranch. The contract is, of course, silent as to the time of delivery.

In order to sustain the judgment of the trial court it must appear that this obligation to deliver must have been performed before the 23d, which manifestly is not the case. He might, in an extreme view, be held for damages for that part of the 52 cars deliverable between the 18th and the 23d, but not for any deliverable beyond the 23d. Viewed in any possible light, it was perfectly competent for the parties to make this modifying agreement of October 18th.

While there might not have been any consideration on the part of Kornblum, there assuredly was on the part of Emerzian. From the mass of contradictory testimony regarding the execution of this contract, the truth in our judgment is not hard to obtain. On

account of the shortage of cars, Kornblum was uncertain whether he could obtain complete delivery, and rather than take a chance of receiving an uncertain 52 cars, he accepted a certain 15.

RULINGS

Prejudicial error was committed in the ruling of the trial court by which Kornblum was allowed to testify over objection of plaintiff in error that on the strength of his contract with Emerzian, he made contracts of sale of grapes in the East. (Tr. pp. 128) No special damage on this account was pleaded, and the evidence was prejudicial to the plaintiff in error.

Cole v. Swanston, 1 Cal. 51.

Error was also committed when witness Kornblum was allowed to testify over objection that he had gone into the market and purchased grapes from persons other than the plaintiff in error. (Tr. pp. 129) This is prejudicial error.

Fairchild v. Southern etc. Co., 158 Cal. 264 (271).

Plaintiff in error therefore respectfully submits that the damages assessed by the trial court are entirely excessive, not supported by

the law of California and computed upon an entirely erroneous theory; that the rulings of the trial court also are such as to call for reversal.

Respectfully submitted,
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